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CASE NO.
83-6419

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

DAVID ROSS DELAP,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

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STATE OF FLORIDA,

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

The Petitioner, David Ross Delap, seeks review of three (3) constitutional issues decided by the Supreme Court of Florida in affirming his conviction for murder in the first degree and his sentence of death. The petitioner will be referred to by name and as petitioner herein.

Appended to the petition is an appendix containing a conformed copy of the decision of the Supreme Court of Florida and other portions of the record pertinent to this court's exercise of its certiorari jurisdiction. References to the appendix will be by the symbol "A" followed by the appropriate page number.

CITATION TO OPINIONS BELOW

The opinion of the Supreme Court of Florida is reported at 440 So.2d 1242 (Fla. 1983) and is set out in the appendix to this petition at pages 1 - 16.

JURISDICTION

The judgment of the Supreme Court of Florida was issued September 15, 1983, and a timely motion for rehearing was denied December 14, 1983 (A-25). On February 2, 1984, Justice Powell granted an extension to and including March 13, 1984, for the filing of this petition.

The jurisdiction of this Court is invoked pursuant to Title 28, U.S.C. Section 1257(3) and Amendments IV, V and XIV, United States Constitution.

QUESTIONS PRESENTED FOR REVIEW

A. WHETHER THE REQUIREMENT PLACED UPON A CRIMINALLY ACCUSED DEFENDANT TO PROVE BY HIS TESTIMONY THAT THE SOLE PROCURING MOTIVE OF A CONFESSION WAS ILLEGALLY SEIZED EVIDENCE, WHEN THE STATEMENT WAS OBTAINED WHILE THE PETITIONER WAS IN POLICE CUSTODY, CONTRAVENES THE FOURTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION?

B. WHETHER IT IS A VIOLATION OF THE FIFTH AMENDMENT DOUBLE JEOPARDY CLAUSE FOR A SENTENCING JUDGE TO FIND A DEFENDANT GUILTY OF KIDNAPPING, AS AN AGGRAVATING CIRCUMSTANCE IN SUPPORT OF THE DEATH PENALTY, WHEN A JUDGMENT OF ACQUITTAL HAD BEEN ENTERED BY THE TRIAL JUDGE ON THE ISSUE OF WHETHER KIDNAPPING HAD BEEN PROVEN TO SUPPORT A FELONY-MURDER CONVICTION AT A PRIOR TRIAL OF THE CHARGE?

C. WHETHER A DUE PROCESS OF LAW VIOLATION UNDER THE FOURTEENTH AMENDMENT CAN BE CONSIDERED HARMLESS AT THE APPELLATE REVIEW STAGE WHEN A DEATH SENTENCE HAS BEEN IMPOSED AS A RESULT OF AN INVESTIGATION CONDUCTED PRIVATELY BY THE SENTENCER WHEN THE DEFENDANT IS NOT GIVEN AN OPPORTUNITY TO KNOW AND CONFRONT THE EVIDENCE OBTAINED DURING THE SENTENCER'S PRIVATE INVESTIGATION?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the

militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner seeks review of the decision of the Supreme Court of Florida reported as Delap v. State, 440 So.2d 1242 (Fla. 1983). The decision below affirmed the petitioner's conviction of murder in the first degree and imposition of a sentence of death. (A-1). Timely motion for rehearing was denied (A-17-25).

The petitioner was first convicted and sentenced in Okeechobee County, Florida, in 1976. His conviction was reversed because of the state's inability to provide a sufficient transcript of those proceedings for appellate review. Delap v. State 350 So.2d 462 (Fla. 1977). Upon remand, the petitioner was again tried, convicted and sentenced to death.

The issues raised in this petition were directly raised by the petitioner in the state courts and were expressly ruled upon by the Supreme Court of Florida in its decision affirming the judgment of the sentence.

STATEMENT OF THE FACTS

The petitioner has been convicted of first degree murder in the death of Paula Ethridge on or about June 30, 1975. The victim was reported missing on July 1, 1975. The appellant was questioned by a sheriff's investigator after a report had been received that a man and a woman were seen struggling in a vehicle matching the description of the petitioner's vehicle. On July 7,

1975, the petitioner agreed to accompany the investigator and a sheriff's lieutenant to the sheriff's office where the petitioner was questioned concerning the victim's disappearance. A confession was eventually obtained during this interrogation.

At a hearing on the petitioner's motion to suppress statements and confessions, the court below ruled that the petitioner showed that the statements obtained from him during in-custody interrogation were tainted by the use of illegally obtained evidence and information by the interrogating officers. Delap v. State, supra at 1252 - 1253. The court found that the interrogation was not based solely upon the illegally obtained evidence. Therefore,the court concluded that the accused had the burden to prove by his own testimony, if necessary, that the statements and admissions were procured solely by the use of the unlawfully seized evidence. Id. at 1253.

The court below expressly held, Delap v. State, supra at 1248, that the interrogators had "confronted defendant with the information derived from [the illegal search] and for about twenty (20) minutes continued to point out that defendant was lying. Defendant then confessed to killing the victim because he was mad."

The petitioner contended below that imposition of death by use of the aggravating circumstance that the capital felony was committed during commission of a kidnapping constituted double jeopardy. At petitioner's first trial the judge found that the evidence was "insufficient to support a felony murder basis for conviction." Id at 1255. The petitioner argued that resubmission of this issue constituted double jeopardy, and he relied upon the decision of this court in Bullington v. Missouri, 451 U.S. 430 (1981). The Florida Supreme Court ruled that the Double Jeopardy Clause does not bar a state from adducing evidence to demonstrate that the death penalty is appropriate even when at the guilt phase of the proceedings the trial court has entered a judgment of acquittal on the very same facts and legal issues. Thus petitioner raises the question whether entry of a judgment

of acquittal as to a particular offense at the guilt phase of a trial precludes the state from using the same alleged offense as a basis for imposition of a sentence of death.

Petitioner also raises the issue whether it was a violation of due process of law for the sentencing judge to conduct a private investigation of the petitioner by visiting the Florida State Prison where petitioner had been incarcerated and as a result of such investigation determining that petitioner's conduct on death row did not constitute a mitigating circumstance. Id at 1257.

The Supreme Court of Florida ruled that this investigation by the trial judge constituted a violation of the principles set forth by this court in Gardner v. Florida, 430 U.S. 439 (1977). The court below ruled that the error was harmless. Thus petitioner was denied an opportunity to have the results of the investigation set forth so that he could rebut, explain or amplify any of the findings made by the sentencing judge that resulted from the judge's independent investigation of the petitioner's background. The petitioner contended below, and raises here, the question whether the due process violation can be remedied by a finding of harmless error or whether the petitioner is entitled to a new sentencing hearing at which he will be permitted to contradict, rebut or explain any of the findings made by the sentencing court which formed the basis for the court's determination that no mitigating circumstance existed.

The decision below was made final by the denial of rehearing on December 14, 1983, leaving petitioner's conviction and sentence undisturbed.

REASONS FOR GRANTING THE WRIT

A. WHETHER THE REQUIREMENT PLACED UPON A CRIMINALLY ACCUSED DEFENDANT TO PROVE BY HIS TESTIMONY THAT THE SOLE PROCURING MOTIVE OF A CONFESSION WAS ILLEGALLY SEIZED EVIDENCE, WHEN THE STATEMENT WAS OBTAINED WHILE THE PETITIONER WAS IN POLICE CUSTODY, CONTRAVENES THE FOURTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION?

The Supreme Court of Florida held in the decision below that the statements and admissions obtained from Delap were tainted by the illegal seizure of evidence. Information obtained by this

seizure was utilized in the interrogation of Delap. The court below held that "granting the establishment of the primary illegality", the petitioner had an additional burden to prove that the statements were obtained by exploitation of that illegality and that the illegal evidence was what motivated him to confess. Delap v. State, supra at 1251 - 1253.

In ruling that the petitioner had not sustained this burden, the court below recognized that the admissions obtained during interrogation were based upon legally obtained as well as illegally obtained information. Id. at 1253. In such situation, the court held that it was the burden of the accused to show that the tainted information was the sole effective cause of his confession given while being interrogated in police custody. Id. at 1253.

The issue presented is one upon which this court has not specifically ruled. In view of the fact that the issue concerns the application of petitioner's right under the Fourth Amendment in a state proceeding to be free from unreasonable searches and seizures, this is a question which this court should determine. Stone v. Powell, 428 U.S. 465 (1976).

It has been established in Brown v. Illinois, 422 U.S. 590 (1975), that the mere giving of Miranda warnings does not remove the taint of an illegal seizure or arrest. Other factors are to be considered, and the burden remains upon the prosecution to establish circumstances which would permit use of the statement despite the illegality. Additionally, in Dunaway v. New York, 442 U.S. 200 (1979), it was held that once the causal connection between the illegality and the statements was established the burden is placed on the prosecution to establish a significant and sufficient break in the causal connection between the illegality and the confession to render the confession admissible. Since this court determined in Taylor v. Alabama 457 U.S. 687 (1982), that a break in the chain of unlawful detention by permitting visits from an arrestee's girlfriend and companion was an insufficient intervening circumstance to remove the

original taint, the state in this case failed in its burden to establish that the confession was free of the taint of the Fourth Amendment violation.

Thus, the question whether it is constitutionally permitted for a state to require the accused to establish by his own testimony that the sole motivation for a confession was illegally obtained evidence when the interrogation includes use of both lawful and unlawful evidence. This question is ripe for review by this court and should be given plenary consideration in this cause in view of the fact that consideration of this issue may be barred in federal collateral proceedings. See Cardwell v. Taylor, 461 U.S. ___, 103, S.Ct. 2015 (1983).

B. WHETHER IT IS A VIOLATION OF THE FIFTH AMENDMENT DOUBLE JEOPARDY CLAUSE FOR A SENTENCING JUDGE TO FIND A DEFENDANT GUILTY OF KIDNAPPING, AS AN AGGRAVATING CIRCUMSTANCE IN SUPPORT OF THE DEATH PENALTY, WHEN A JUDGMENT OF ACQUITTAL HAD BEEN ENTERED BY THE TRIAL JUDGE ON THE ISSUE OF WHETHER KIDNAPPING HAD BEEN PROVEN TO SUPPORT A FELONY-MURDER CONVICTION AT A PRIOR TRIAL OF THE CHARGE?

At the first trial of the indictment under which the petitioner has been convicted and sentenced to death, the presiding judge ruled that the petitioner was entitled to a judgment of acquittal on the issue of whether a felony-murder conviction was supported by the evidence. This finding on the issue of kidnapping, should be binding at the retrial of the cause pursuant to this Court's holding in Bullington v. Missouri, 451 U.S. 430 (1981). In Bullington, the defendant was originally tried for murder and convicted. In a separate sentencing phase the jury fixed punishment at life imprisonment. Upon a retrial ordered by the Missouri supreme court, it was held that the double jeopardy clause prohibited consideration of the death penalty at the retrial.

Likewise, petitioner submits that consideration of whether the evidence would support kidnapping is barred at the penalty phase of petitioner's retrial in view of the trial court's determination at the original trial that the evidence was legally insufficient for a felony-murder conviction because the evidence

was insufficient to prove kidnapping. Upon that basis the trial court entered a judgment of acquittal as to kidnapping at the original trial.

Since the original acquittal was entered at the guilt phase of petitioner's first trial, that finding is binding for all purposes under the Fifth Amendment. The decision of the Supreme Court of Florida permitting relitigation, and permitting the trial court to subsequently find the evidence sufficient for kidnapping, constitutes a direct violation of the Fifth Amendment's Double Jeopardy Clause. Although the Double Jeopardy Clause does not bar retrial of a defendant who has succeeded in overturning a conviction for trial error, e.g. United States v. Tateo, 377 U.S. 463 (1964), such is not the case here. The Supreme Court of Florida misapplied the holding in Tateo to the facts of this case.

In view of the fact that in Florida a double jeopardy violation is considered as fundamental as the right to a fair trial, Bizzell v. State, 71 So.2d 735 (Fla. 1954), the significance of this question is not undermined by the fact that other aggravating circumstances existed as found by the trial court to support a death sentence. Moreover, since the Supreme Court of Florida found no error, no harmless error determination has been made. Accordingly, this Court should grant plenary review of this issue.

C. WHETHER A DUE PROCESS OF LAW VIOLATION UNDER THE FOURTEENTH AMENDMENT CAN BE CONSIDERED HARMLESS AT THE APPELLATE REVIEW STAGE WHEN A DEATH SENTENCE HAS BEEN IMPOSED AS A RESULT OF AN INVESTIGATION CONDUCTED PRIVATELY BY THE SENTENCER WHEN THE DEFENDANT IS NOT GIVEN AN OPPORTUNITY TO KNOW AND CONFRONT THE EVIDENCE OBTAINED DURING THE SENTENCER'S PRIVATE INVESTIGATION?

As the Supreme Court of Florida determined in the decision below, the sentencing judge, unknown to the petitioner, conducted an independent, private investigation of the petitioner by visiting the Florida State Prison and inquiring of the petitioner's conduct during petitioner's incarceration prior to the sentencing.

As a result of the private investigation conducted by the sentencing judge, the court find that no mitigating evidence should be considered in imposing sentence. The Supreme Court of Florida found that this error "did not injuriously affect the substantial rights of the defendant." Delap v. State, supra at 1257.

In Gardner v. Florida, supra, this Court held that it was a violation of due process of law guaranteed under the Fourteenth Amendment for a sentence of death to be imposed upon consideration of any evidence not made known to the defendant and as to which the defendant is not given the opportunity to rebut, deny, or explain. In Gardner, this Court was urged, and had before it, the presentence investigation report which had been prepared and utilized by the sentencing judge in that case. However, this court noted in footnote 5, that the due process violation would not be cured by a review of the contents of the presentence report for harmless error.

The prejudice to the petitioner lies in the inability of the petitioner to argue, explain or rebut any of the evidence upon which the trial court concluded that no mitigating factors existed in this case. Just as in Gardner v. Florida, supra, where a jury had recommended life imprisonment, and no mitigating factors were found, this Court found the due process violation in the sentencing procedure required further proceedings at which the defendant and his counsel would be permitted to confront, rebut, or explain all information considered by the sentencer in imposing the death sentence.

In the present case, the absence of a finding by the sentencer that mitigation existed in the case was clearly prejudicial to the petitioner in both the determination of sentence and in the appellate review of that sentence. The due process violation has resulted in a death sentence being imposed in part upon information known only to the sentencer, thus the reliability of the sentence is undermined, and appellate review of the full basis upon which the sentence was imposed has been prevented.

This court should consider whether the state court's determination of harmless error comports with the Due Process Clause and the determination made in Gardner v. Florida, supra, that a sentence imposed upon information not made known to the defendant and his counsel cannot stand.

CONCLUSION

The petition for Writ of Certiorari should be granted on the issues presented herein.

Respectfully submitted,

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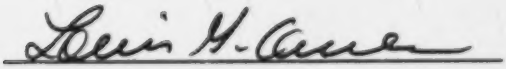

LOUIS G. CARRES
Assistant Public Defender

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CERTIFICATE OF SERVICE

I, LOUIS G. CARRES, hereby certify that I am a member of the bar of the Supreme Court of the United States and that I have served copies of the Petition for Writ of Certiorari to the Supreme Court of Florida and of the Motion for Leave to Proceed in Forma Pauperis, in the above case on counsel for the respondent by depositing same in the United States mail, first class mail, postage prepaid, addressed as follows:

Max Rudmann, Esq.
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All parties required to be served have been served. Done this 13th day of March, 1984.

Louis G. Carres

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David Ross DELAP, Appellant,

v.

STATE of Florida, Appellee.

No. 56235.

Supreme Court of Florida.

Sept. 15, 1983.

Rehearing Denied Dec. 14, 1983.

Defendant was convicted in the Circuit Court, Orange County, Philip G. Nourse, J., of murder in the first degree, and he appealed. The Supreme Court, Adkins, J., held that: (1) defendant's attorney-client privilege was not violated when trial court overruled his objections to a question propounded to defense counsel's investigator; (2) defendant's constitutional rights were not violated by exclusion of inadmissible polygraph evidence; (3) defendant's confession was not subject to being suppressed on ground that it was the fruit of an illegal search; (4) trial court did not commit reversible error when it overruled defendant's objection to opinion of prosecution's medical expert concerning cause of death of victim; (5) trial court properly denied defendant's request to instruct jury on maximum and minimum sentences for lesser included offenses of first-degree murder; (6) standard jury instruction adequately covered instructions on mitigating circumstances; and (7) imposition of death sentence was supported by such aggravating circumstances as fact that defendant had been previously convicted of a felony involving force.

Affirmed.

1. Witnesses ⇐206

The prosecution may not make the defense counsel's investigator a state witness so that the accused's confidential communications to his attorney's investigator are exposed in the courtroom and used by the State against the accused.

2. Witnesses ⇐206

The justification for the privilege accorded an accused's confidential communication to his attorney's investigator lies not in the fact of communication, but in the interest of the persons concerned that the subject matter should not become public.

3. Witnesses ⇐219(3)

A communication by an accused to his attorney's investigator loses its confidential character if the accused himself ceases to treat the matter as confidential.

4. Criminal Law ⇐296(2)

Defendant could not seek to elicit from his attorney's investigator testimony which would aid defendant in having his confession suppressed, while selectively blocking inquiries concerning his state of mind at time of confession which were not beneficial to his cause, and trial court properly overruled defendant's objection to those inquiries.

5. Criminal Law ⇐388

Where evidence is based solely upon scientific tests and experiments, it is essential that reliability of test be recognized and accepted by scientists or that demonstration pass from stage of experimentation to that of reasonable demonstrability.

6. Criminal Law ⇐388

Polygraph testing has not passed the reliability threshold so as to allow its admission as a scientific test or experiment.

7. Criminal Law ⇐388

Use of a polygraph examination as evidence is premised on the waiver by both parties of evidentiary objections as to lack of scientific reliability for the examination.

8. Criminal Law ⇐388

Testimony of defense counsel's investigator on results of a polygraph examination administered to defendant was inadmissible in absence of a stipulation or agreement as to admissibility.

9. Criminal Law ⇐308

Requiring a stipulation or agreement as to admissibility before results of defendant's polygraph examination could be ad-

mitted was not an arbitrary evidentiary rule which operated to deny defendant a full and fair hearing on voluntariness of his confession by preventing him from adducing important favorable evidence regarding effect of investigating officer's interrogation tactics.

10. Criminal Law ⇐518(4)

Confession given by defendant after being fully apprised of his *Miranda* rights was not subject to being suppressed as coerced or as the fruit of an illegal search as long as the defendant was fully apprised of his *Miranda* rights and clearly understood those rights.

11. Criminal Law ⇐412.2(4)

Defendant's statement to interrogating officers that he was represented in another matter did not constitute a demand for the presence of an attorney in the matter at hand and, hence, did not require the officers to discontinue their interrogation until an attorney was present.

12. Criminal Law ⇐412.2(5)

The right to counsel during questioning can be waived.

13. Criminal Law ⇐412.1(1)

Investigating officers are not required to try to convince a defendant who is being interrogated that he needs an attorney.

14. Criminal Law ⇐517.2(2)

Rule in *Edwards* respecting admissibility of a confession obtained during an interrogation after accused invokes his right to counsel was not applicable in situation where defendant voluntarily agreed to questioning and did not invoke his right to counsel upon being informed of his rights.

15. Criminal Law ⇐517(7)

Confession made by defendant was not the product of a search made pursuant to an invalid search warrant and, hence, was not subject to being suppressed as long as it was not induced by interrogating officer's use of information secured by other officers searching defendant's home.

16. Criminal Law ⇐414

Once evidence clearly showed voluntary nature of defendant's incriminating statement, burden then fell upon defendant to raise search and seizure issue by showing that allegedly tainted statement was the product of an unlawful search and seizure.

17. Criminal Law ⇐394.1(3)

The exclusionary rule operates against evidence seized and information acquired during an unlawful search as well as against derivative evidence; however, it does not follow that such evidence or information is rendered forever unusable.

18. Criminal Law ⇐394.1(3)

Evidence is not inadmissible as the fruit of a poisonous tree simply because it would not have come to light but for the illegal action of the police; the more apt question is whether, granting the establishment of the primary illegality, the evidence to which objection is made has been come at by exploitation of that illegality or instead by being sufficiently distinguishable to be purged of the primary taint.

19. Criminal Law ⇐517(7)

If a defendant establishes that he was the victim of an illegal search of seizure, that within a reasonable time thereafter he was interrogated about an offense to which the illegal act was relevant, and that such interrogation resulted in his making a statement, the defendant has made a prima facie showing that the confession was the product of and tainted by the illegal act, and the confession is inadmissible unless the prosecution removes the taint by showing that the illegal act was not the sole effective cause of the confession.

20. Criminal Law ⇐517(7)

Where search did not result in discovery of evidence incriminating to defendant, since the officers were interrogating defendant on basis of information already in their possession from lawful sources and, even if search had not occurred, would have interrogated defendant concerning identical incriminating evidence which illegal search produced, illegal search was not the sole producing agent of interrogation and,

hence, was not a basis for suppressing the confession on ground of taint.

21. Criminal Law ⇐517(7)

Where improperly obtained information is used during an interrogation, a confession obtained as a result thereof bears the same taint as the illegal information and is inadmissible unless the prosecution can establish that such use was not the sole effective cause of the confession.

22. Criminal Law ⇐531(1)

If defendant establishes a probable causal connection between illegal act and statement or confession, the prosecution must assume the burden of proving that the illegal act was not the sole effective cause of the acquisition of the evidence or statement; the issue in such case is what motivated the accused to confess, and the prosecution need establish only that the tainted information or evidence probably was not the sole effective cause of the confession, and the defendant then has the burden of proving otherwise.

23. Criminal Law ⇐517(7), 531(1)

A confession obtained during interrogation in which officers make use of illegally obtained information is inadmissible unless prosecution establishes that confession was made voluntarily and was not the product of the tainted evidence; the accused is the best witness as to his own motives, and there is no injustice in a rule which requires him to prove what his motive was in confessing if he wishes to invoke the exclusionary rule.

24. Criminal Law ⇐476

Expert medical opinion as to cause of death does not need to be stated with reasonable certainty in a homicide prosecution and is competent if expert can show that, in his opinion, occurrence could cause death or that occurrence might have or probably did cause death.

25. Criminal Law ⇐1169.9

Overruling defendant's objection to opinion of prosecution's medical expert concerning cause of death of homicide victim was not reversible error on ground that expert was required to express his opinion in terms of reasonable medical certainty.

26. Criminal Law ⇐858(4)

Rule giving trial court discretion in determining whether instructions should be sent to jury room when jury retires for deliberation vests trial court with discretion to determine whether written instructions should be carried to jury room for use during deliberations. West's F.S.A. RCrP Rules 3.390(b), 3.400.

27. Criminal Law ⇐796

Denial of defendant's request to instruct jury on maximum and minimum sentences for lesser included offenses of first-degree murder was not an abuse of discretion. West's F.S.A. RCrP Rules 3.390(b), 3.400.

28. Criminal Law ⇐829(22)

Denial of requested instruction that mitigating circumstances other than statutory ones could be considered was not error as long as standard jury instruction adequately covered issue of mitigating circumstances.

29. Criminal Law ⇐966.6(3)

Evidence respecting defendant's prior conviction of a violent felony displayed the use or threat of violence to a person during the commission of such felony and, as such, was relevant to show an aggravating circumstance in determining propriety of imposition of death sentence. West's F.S.A. RCrP Rules 3.390(b), 3.400.

30. Criminal Law ⇐163

Although trial judge at defendant's first trial found evidence insufficient to support a felony-murder basis for conviction, double jeopardy clause did not bar State from introducing evidence at second trial to demonstrate that death penalty was appropriate and, hence, from arguing at penalty phase that offense was committed during a rape, robbery or kidnapping, albeit that it did not submit a felony-murder theory during guilt phase. U.S.C.A. Const. Amend. 5.

31. Homicide ⇐354

The aggravating factors of being under sentence of imprisonment and being previously convicted of another felony involving violence do not cover the same aspect of the defendant's criminal history and, hence, may each be submitted as an aggravating circumstance during the penalty phase in order to determine propriety of imposing death sentence. West's F.S.A. RCrP Rules 3.390(b), 3.400.

32. Homicide ⇐354

Imposition of death sentence in prosecution for murder in the first degree was supported by evidence indicating such aggravating circumstances as fact that murder was committed while defendant was under sentence of imprisonment, that defendant had been previously convicted of a felony involving the use of force, that defendant created a great risk of death to many persons, and that murder occurred while defendant was engaged in commission of a kidnapping, robbery, and rape. West's F.S.A. RCrP Rules 3.390(b), 3.400.

33. Criminal Law ⇐1208.1(5)

It is only conduct surrounding the capital felony for which defendant is being sentenced which properly may be considered in determining whether defendant created a great risk of death to many persons, an aggravating circumstance justifying imposition of the death penalty. West's F.S.A. RCrP Rules 3.390(b), 3.400.

34. Homicide ⇐354

Evidence of victim's kidnapping, her struggle, her pleas for help, and extremely cruel beating and strangulation supported the finding as an aggravating circumstance for death penalty that murder was extremely cruel, heinous, and atrocious. West's F.S.A. RCrP Rules 3.390(b), 3.400.

35. Criminal Law ⇐1208.1(6)

Act of trial judge in visiting state prison to determine if defendant's conduct on death row constituted a mitigating circumstance was error, but since trial judge found a nonstatutory mitigating factor which he considered in imposing sentence, error did not injuriously affect substantial rights of defendant. West's F.S.A. RCrP Rules 3.390(b), 3.400.

Richard L. Jorandby, Public Defender and Margaret Good, Asst. Public Defender, Fifteenth Judicial Circuit, West Palm Beach, for appellant.

Jim Smith, Atty. Gen. and Max Rudmann, Asst. Atty. Gen., West Palm Beach, for appellee.

ADKINS, Judge.

Appellant (David Ross Delap), hereinafter referred to as defendant, was adjudged guilty of murder in the first degree and, as recommended by the jury, sentenced to death. This appeal resulted. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const.

Defendant was first convicted and sentenced to death in Okeechobee County in 1976. His conviction was reversed because of the state's inability to provide a sufficient transcript for appellate review. *Delap v. State*, 350 So.2d 462 (Fla.1977). After remand, venue was changed to Orange County.

Sometime after 4:00 p.m. on June 30, 1975, the victim, Paula Etheridge, went to a laundromat to wash her clothes. She was wearing a red top and shorts. The next day the sheriff's office received a report that she was missing.

Between 5:30 and 6:00 p.m. on June 30, 1975, Ava Leonard and her daughter saw a slow-moving car with the front passenger door open traveling on Highway 70. The car swerved into the Leonard yard. A girl wearing a red top and "tan or brown" shorts was hanging out of the door of the car, screaming, "Help me, God, somebody help me." A man was holding her by the neck so she would not jump.

Lois Huff testified that on June 30, 1975, between 5:15 and 6:30 p.m. while driving east on Highway 70 with her three daughters, she noticed something unusual in her rearview mirror. The car behind hers contained a man and woman who were struggling. The man was holding the woman's

head in the crook of his arm. Ms. Huff was behind a Walpole truck and all three vehicles were going in the direction of West Palm Beach. Ms. Huff stopped at a service station to call the sheriff. When no one responded within a few minutes, she tried to overtake the car. Although she drove all the way to West Palm Beach and did not pass the Walpole truck, she did not find the car.

The Walpole truck driver, Willy Kelly, saw a 1975 Plymouth or Dodge of faded color proceeding at approximately forty to fifty miles per hour. He saw an arm that was not moving hanging out the passenger door. Kelly slowed to see what was happening and the car took a left turn. He saw the passenger door come all the way open and a man stopped the car right after the turn in the middle of the road. The man got out and walked around the car, as Kelly drove on to West Palm Beach.

Jo Randolf, at the time a student at Okeechobee Community College, knew the defendant. On June 30, 1975, she saw defendant after 5:00 p.m. prior to a class she had with him. Defendant left but returned after class began, during the break. When defendant returned he had blood on his shirt. She overheard defendant say his child had been in an accident and that defendant had taken the child to a hospital for medical assistance. Defendant said the blood on his shirt came from the child's cut.

When a missing person report was received on July 1, 1975, Lt. Arnold investigated the report of a man and woman struggling in a car. Defendant's car was pointed out to him by Lois Huff and the car was placed under surveillance. State attorney investigator Brumley was told defendant's car fitted the description of the auto observed by witnesses as being involved in the disappearance. Brumley investigated defendant's background and obtained additional information. On July 7, 1975, Brumley sought to discuss the case with defendant. Brumley confronted defendant with the fact that he matched the description of the man seen struggling with a female and that his car matched the description given by witnesses. Defendant was also confronted with the fact that blood had been seen on his shirt the same evening and that his claim that between 6:00 and 8:00 p.m. he had taken one of his children to the hospital in Sebring, 52 miles away, had the child treated, and returned to the college was incredible.

Defendant agreed to accompany Lt. Arnold and Investigator Brumley to the sheriff's office, where he was questioned. Eventually the defendant gave a statement and took the officers to the place where he had hidden the victim's body.

In his first issue, defendant contends that his attorney-client privilege was violated when, at his first suppression hearing prior to the first trial, the trial judge overruled his objection to a question propounded to public defender investigator Coppock. At the hearing defendant called Coppock to testify in his attempt to suppress the confession. The defense established that Coppock, a trained polygraph examiner, examined the defendant. The purpose of the polygraph examination was to determine whether defendant had been given *Miranda* warnings and whether he had been promised psychiatric help prior to his confession. The state's objection to the introduction of the polygraph examination was sustained.

Defense counsel then proceeded to elicit from the witness Coppock that during the polygraph examinations, pursuant to questions, defendant denied making any statement that he had not been offered psychiatric help or that he had been advised of his rights. On cross examination the prosecutor asked Coppock whether he had asked defendant about a statement wherein defendant told chief of police Statts that he confessed because he trusted and liked Chief Statts. The objection of defendant to this question was overruled. Defendant now claims that the court's failure to sustain these objections was a violation of confidential attorney-client communications.

[1-4] The prosecution may not make the defense counsel's investigator a state witness so that the accused's confidential communication to his attorney's investigator

are exposed in the courtroom and used by the state against the defendant. As with all privileged communications, the justification for the privilege lies not in the fact of communication, but in the interest of the persons concerned that the subject matter should not become public. But when a party himself ceases to treat the matter as confidential, it loses its confidential character. *Savino v. Luciano*, 92 So.2d 817 (Fla. 1957). *See Tibado v. Bress*, 212 So.2d 61 (Fla. 2d DCA 1968); *Soler v. Kukula*, 297 So.2d 600 (Fla. 3d DCA 1974). Defendant sought to elicit from Investigator Coppock only testimony which would aid him in having the confession suppressed, while selectively blocking inquiries concerning his state of mind at the time of the confession which were not beneficial to his cause. The trial judge properly overruled defendant's objection to the question.

At the hearing on defendant's motion to suppress statements and confessions, defendant attempted to introduce Coppock's testimony on the results of a polygraph examination administered to the defendant. The state objected on the ground that such testimony was incompetent and wholly inadmissible. The rule that polygraph evidence is inadmissible is well established in Florida. *Zeigler v. State*, 402 So.2d 365 (Fla.1981), *cert. denied*, 455 U.S. 1035, 102 S.Ct. 1739, 72 L.Ed.2d 153 (1982); *Sullivan v. State*, 303 So.2d 632 (Fla.1974), *cert. denied* 428 U.S. 911, 96 S.Ct. 3226, 49 L.Ed.2d 1220 (1976); *Kaminski v. State*, 63 So.2d 339 (Fla.1952). Such evidence is admissible where the parties stipulate or agree to its admissibility. *Anderson v. State*, 241 So.2d 390 (Fla.1970), *vacated*, 408 U.S. 938, 92 S.Ct. 2868, 33 L.Ed.2d 758 (1972); *State v. Brown*, 177 So.2d 532 (Fla. 2d DCA 1965). Defendant challenges this stipulation or consent requirement as an arbitrary evidentiary rule which operates to deny him a full and fair hearing on the voluntariness of his confession by preventing him from adducing important favorable evidence regarding the effect of the officer's interrogation tactics.

[5, 6] Where evidence is based solely upon scientific tests and experiments, it is essential that the reliability of the test be recognized and accepted by scientists or that the demonstration pass from the stage of experimentation to that of reasonable demonstrability. *Rodrigues v. State*, 327 So.2d 908 (Fla. 3d DCA), *cert. denied*, 336 So.2d 1184 (Fla.1976). Polygraph testing has not passed the reliability threshold. *State v. Curtis*, 281 So.2d 514 (Fla. 3d DCA 1973), *cert. denied*, 290 So.2d 493 (Fla.1974).

[7–9] The use of a polygraph examination as evidence is premised on the waiver by both parties of evidentiary objections as to lack of scientific reliability. The evidence fails to show that the polygraph examination has gained such reliability and scientific recognition in Florida as to warrant its admissibility. The Florida rule of inadmissibility reflects state judgment that polygraph evidence is too unreliable or too capable of misinterpretation to be admitted at trial. However, the court does recognize that the parties may waive their evidentiary objection. Defendant's constitutional rights have not been violated by the exclusion of inadmissible polygraph evidence.

Defendant contends that the trial judge committed error when he admitted defendant's confession into evidence, arguing that the confession should have been suppressed on the grounds that it was coerced and that it was the fruit of an illegal search.

[10] After a week's investigation of the victim's disappearance, state attorney investigator Brumley and Deputy Arnold approached Delap at the community college before 9:00 p.m. on July 7, 1975. The officers had already secured search warrants for Delap's home and car from a county judge. The defendant was not informed of this when he agreed to accompany Arnold and Brumley to the sheriff's office. The evidence is sufficient to sustain the finding of the trial judge that defendant was fully apprised of his rights as required by *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The evidence clearly shows that defendant understood these rights.

[11] Defendant points out that if the accused requests an attorney, the interrogation must cease until an attorney is present. Defendant claims that he asserted his right to counsel by informing the interrogating officers that he was already represented by the public defender's office. This representation was in an unrelated matter. Defendant's statement that he was represented in another matter does not constitute a demand for the presence of an attorney in the matter at hand.

[12, 13] The right to counsel during questioning can be waived. *Witt v. State*, 342 So.2d 497 (Fla.), cert. denied, 434 U.S. 935, 98 S.Ct. 422, 54 L.Ed.2d 294 (1977). Investigating officers are not required to try to convince a defendant that he needs an attorney. *Palmes v. State*, 397 So.2d 648 (Fla.), cert. denied, 454 U.S. 882, 102 S.Ct. 369, 70 L.Ed.2d 195 (1981); *State v. Craig*, 237 So.2d 737 (Fla.1970).

[14] On cross examination, in response to the question, "Did you ever at any time ask to call a lawyer?", the defendant replied, "A lawyer didn't enter my mind." Apparently the defendant never requested counsel despite his understanding of his rights. *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), relied upon by defendant, involved a situation where the accused invoked his right to counsel during interrogation, interrogation ceased, the next morning the defendant told a detention officer he did not wish to speak to anyone, the officer told accused he had to, and the accused thereafter was interrogated again. *Edwards v. Arizona* is inapplicable because here the defendant voluntarily agreed to the questioning and did not invoke his right to counsel upon being informed of his rights.

When defendant accompanied the officers to the sheriff's office, Investigator Brumley made arrangements for Florida Department of Criminal Law Enforcement agent Buchannan to execute a search warrant on the home of defendant. Brumley instructed Buchannan to determine if any of defendant's children had injuries to their hands and if there was any digging around defendant's house or shed. Brumley interrupted the interrogation to call Buchannan at defendant's house and learned that as a result of the search they found no digging nor injuries to the children's hands. While he was out of the interrogation room for the purpose of calling Buchannan, Brumley also called police chief Statts to join the interrogation because he was a friend of defendant's. After Brumley returned to the interrogation room and after Chief Statts arrived, Brumley confronted defendant with the information derived from Buchannan and for about twenty minutes continued to point out that defendant was lying. Defendant then confessed to killing the victim because he was mad.

[15] The search warrant authorizing Buchannan to search the defendant's home was declared invalid. Defendant argues that the confession was the product of a search made pursuant to an invalid search warrant. In support of his contention, defendant cites *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963), where the Supreme Court held that the rule excluding evidence obtained by an unlawful search bars from trial not only physical, tangible materials obtained either during or as a direct result of an unlawful invasion, but also verbal evidence, such as declarations made by the accused. The question to be determined is whether defendant's incriminating statements were induced by Brumley's use of information secured by the officers searching defendant's home.

Prior to the questioning and search of defendant's home, Investigator Brumley was in possession of circumstantial evidence implicating defendant in the crime. Brumley knew defendant owned an automobile which fit the description of an automobile observed by witnesses to be involved in the disappearance of the victim. Defendant matched the description of the suspect seen struggling with the victim. Defendant had been observed at the junior college with blood on his shirt the evening of the crime. He had explained that the blood came from one of his children who had been injured

and taken to the hospital. Defendant had left the community college at 6:00 p.m. and returned at 8:00 p.m., and he had claimed that he had taken the child to the Sebring hospital. Investigator Brumley knew that it was impossible to get to Sebring hospital, fifty-two miles away, have the child treated and return within two hours.

From the preliminary questioning, Investigator Brumley knew that defendant could not verify where he was between 6:00 and 8:00 p.m. through a witness. Defendant gave his consent for a search of his car and the search revealed apparent blood stains and footprints on the passenger door front side and a shovel.

On cross examination defendant was asked whether the fact that his son's finger had not been cut made him confess. The defendant replied, "I don't know what made me confess." The confession began shortly after police chief Dewitt Statts joined the questioning. Chief Statts testified that defendant said he wouldn't have told the other investigators anything, "But I know you. I go to church with you, and he said I like you and I trust you. And he said I'm willing to tell you what happened."

[16] We agree with the trial judge that the evidence clearly shows the voluntary nature of the statement. It then became necessary for defendant to raise the search and seizure issue by showing that the allegedly tainted statement was the product of the unlawful search and seizure.

[17] The exclusionary rule operates against evidence seized and information acquired during an unlawful search as well as against derivative evidence. However, it does not follow that such evidence or information is rendered forever unusable. In *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319 (1920), the United States Supreme Court was confronted with a conviction of a corporate defendant for contempt arising out of the failure to comply with a subpoena for the production of certain corporate records. The defendant had earlier established that these records were in the possession of the government as a direct result of an unlawful seizure, and so the records had been returned by court order. The government officials, however, made copies of the records and used the copies as the basis for the issuance of a subpoena for the originals. The court set aside the contempt conviction on the ground that the subpoena was a product of the prior illegal seizure, saying:

> The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed.

251 U.S. at 392, 40 S.Ct. at 183.

In *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963), the court set forth the principles to be applied where the issue is whether statements and other evidence obtained after an illegal arrest or search should be excluded. Federal agents solicited an oral statement from defendant Toy after forcing entry at 6:00 a.m. at the laundry at the back of which he had his living quarters. The entry was illegal. Toy's statement, which bore upon his participation in the sale of narcotics, led the agents to question another person, Johnny Yee, who actually possessed the narcotics. Yee stated that heroin had been brought to him earlier by Toy and another Chinese known to him only as "Sea Dog". Toy said that "Sea Dog" was Wong Sun. Toy led agents to a dwelling where, he said, Wong Sun lived. The agents gained admittance to the building and brought Wong Sun out in handcuffs. After arraignment, Wong Sun was released on his own recognizance. Several days later he returned voluntarily to give an unsigned confession.

The Supreme Court ruled that Toy's declarations and the contraband taken from Yee were the fruit of the agents' illegal action and should not have been admitted

as evidence against Toy. The Court held that the statement did not result from "an intervening independent act of a free will", and that it was not "sufficiently an act of free will to purge the primary taint of the unlawful invasion". 371 U.S. at 486, 83 S.Ct. at 416. With respect to Wong Sun's confession, however, the Court held that in light of his lawful arraignment and release on his own recognizance, and of his return voluntarily several days later to make the statement, the connection between his unlawful arrest and the statement "had become so attenuated as to dissipate the taint". 371 U.S. at 491, 83 S.Ct. at 419 citing *Nardone v. United States*, 308 U.S. 338, 60 S.Ct. 266, 84 L.Ed. 307 (1939). In its opinion the Court said:

> We need not hold that all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." Maguire, Evidence of Guilt, 221 (1959).

371 U.S. at 487–8, 83 S.Ct. at 417.

The issue involved in *Brown v. Illinois*, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975), was whether statements were to be excluded as the fruit of an illegal arrest or were admissible because the giving of the *Miranda* warning sufficiently attenuated the taint of the arrest. Defendant was arrested without probable cause and without a warrant. He was given the warnings prescribed by *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Thereafter, while in custody, he made two inculpatory statements. The Court observed that the exclusionary rule protects fourth amendment rights while a *Miranda* warning protects fifth amendment rights. Thus, even if statements were found to be voluntary under the fifth amendment, the fourth amendment issue could still remain. In its opinion, the Court said:

> It is entirely possible, of course, as the State here argues, that persons arrested illegally frequently may decide to confess, as an act of free will unaffected by the initial illegality. But the *Miranda* warnings, *alone* and *per se*, cannot always make the act sufficiently a product of free will to break, for Fourth Amendment purposes, the causal connection between the illegality and the confession. They cannot assure in every case that the Fourth Amendment violation has not been unduly exploited.

422 U.S. at 603, 95 S.Ct. at 2261 (citation omitted) (emphasis in original).

> The question whether a confession is the product of a free will under *Wong Sun* must be answered on the facts of each case. No single fact is dispositive. The workings of the human mind are too complex, and the possibilities of misconduct too diverse, to permit protection of the Fourth Amendment to turn on such a talismanic test. The *Miranda* warnings are an important factor, to be sure, in determining whether the confession is obtained by exploitation of an illegal arrest. But they are not the only factor to be considered. The temporal proximity of the arrest and the confession, the presence of intervening circumstances, see *Johnson v. Louisiana*, 406 U.S. 356, 365, 92 L.Ed.2d 152, 92 S.Ct. 1620 [1626] (1972), and, particularly, the purpose and flagrancy of the official misconduct are all relevant. See *Wong Sun v. United States*, 371 U.S., at 491, 9 L.Ed.2d 441, 83 S.Ct. 407. The voluntariness of the statement is a threshold requirement. Cf. 18 USC § 3501 [18 USCS § 3501]. And the burden of showing admissibility rests, of course, on the prosecution.

422 U.S. at 603–4, 95 S.Ct. at 2261–2 (footnotes omitted).

[18] The courts do not hold that all evidence is fruit of the poisonous tree simply because it would not have come to light but for the illegal action of the police. The more apt question is whether, granting the establishment of the primary illegality, the

evidence to which instant objection is made has been come at by exploitation of that illegality or instead by being sufficiently distinguishable to be purged of the primary taint. This standard incorporates both the "independent source" and the "attenuated connection" limitations to the fruit of the poisonous-tree doctrine. *See* Annot., 43 ALR 3d 385 at 391 (1972).

It is well to consider a few samplings of the many judicial statements and applications of these rules:

> Of course a witness' identity may be derived solely or principally from illegally obtained evidence and warrant a court in disallowing his testimony. But the taint of the unlawful search may be removed if there are independently sufficient "leads" by which the government may discover the identity.

United States v. Resnick, 483 F.2d 354, 357 (5th Cir.), *cert. denied*, 414 U.S. 1008, 94 S.Ct. 370, 38 L.Ed.2d 246 (1973) (citations omitted).

> As to appellants' first point, it is well established that the fruit of unlawful evidence may nevertheless be admitted if the government demonstrates that the evidence would have come to its attention from an independent source. Here, even if the statement obtained from Vivienne Nagelberg in Canada were properly suppressed, there existed a number of independent sources of information which would have led the government to Benichou.... Any taint that may have existed was therefore removed....

United States v. Nagelberg, 434 F.2d 585, 57 (2d Cir.1970), *cert. denied*, 401 U.S. 989, 91 S.Ct. 935, 28 L.Ed.2d 219 (1971) (citations omitted).

> [Unlawful arrests led to information about stolen money orders, but, police also had adequate lawful information which would have led to investigation and the same discovery.] Certainly, the unlawful arrests did not serve to immunize the appellants from prosecution.

United States v. Hoffman, 385 F.2d 501, 503–4 (7th Cir.1967), *cert. denied*, 390 U.S. 1031, 88 S.Ct. 1424, 20 L.Ed.2d 288 (1968).

> [A homicide victim's body was located through an invalid confession.] The mere fact that the body was discovered at the particular time it was discovered because of Killough's disclosure of its whereabouts in his illegally secured confessions is not determinative. We cannot conclude here ... that the body would not have been discovered "but for" Killough's confession, having regard to the evidence here.

Killough v. United States, 336 F.2d 929, 934, (D.C.Cir.1964) (citations omitted).

> Since the search was illegal, and defendant has introduced substantial evidence showing that the heroin and the letter were uncovered as a result of this illegal search, the burden shifted to the government, which then was under an obligation to prove that its evidence had an independent origin. Had the government shown that it had knowledge of the secret compartment from an independent source, the evidence would of course have been admissible.

United States v. Paroutian, 299 F.2d 486, 489 (2d Cir.1962) (citations omitted).

> Even appellant's counsel admitted that in the normal course of investigation the police would have discovered the existence of Gerchak as a witness. Under the circumstances, it is clear that the testimony of Gerchak would have been obtained regardless by means sufficiently distinguishable from the underlying illegality to be purged of the primary taint. The locating of the witness would not have remained unknown "but for" the confession.

Santiago v. State, 444 S.W.2d 758, 761 (Tex. Cr.App.1969) (citations omitted).

> To accept defendant's contention in regard to this evidence, it would be necessary to assume that but for the improper arrest the state never would have been able to discover the location of the cattle, photograph them, and locate the stock yard records. We must reject this conclusion since it seems quite apparent that even without the arrest of the defendant at that particular time and place, the

state would have been able to locate the stolen cattle otherwise. There is nothing so unique about the weigh bill offered by the defendant or his admissions to the officers to indicate that this alone was the only source to the evidence which was subsequently admitted at the trial.

Pfeifer v. State, 460 P.2d 125, 127 (Okla.Cr. App.1969).

[T]he courts have held that evidence obtained as a result of information derived from an unlawful search or other illegal police conduct is not inadmissible under the fruit of the poisonous tree doctrine where the normal course of police investigation would, in any case, even absent the illicit conduct, have inevitably led to such evidence.

People v. Fitzpatrick, 32 N.Y.2d 499, 506, 300 N.E.2d 139, 141, 346 N.Y.S.2d 793, 797, *cert. denied*, 414 U.S. 1050, 94 S.Ct. 554, 38 L.Ed.2d 338 (1973).

In one situation it is relatively simple to determine that a voluntary statement or confession of the defendant is the product of an illegal search. For example, an individual who is present while his home is being searched makes remarks to the searchers during course of the search. Clearly, any such remarks are the result of the search and, if the search is declared illegal, are tainted by it. *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). This is not the situation in the case *sub judice*.

[19] If a defendant establishes that he was the victim of an illegal search or seizure, that within a reasonable time thereafter he was interrogated about an offense to which the illegal act was relevant, and that such interrogation resulted in his making a statement, the defendant has made a prima facie showing that the confession was the product of and tainted by the illegal act. The confession, of course, would be inadmissible unless the prosecution removes the taint by showing that the illegal act was not the sole effective cause of the confession. For example, if the search had been completely fruitless, producing no information whatever, there could be no causal connection between the search and the confession.

[20] In the case *sub judice* the search did result in the discovery of evidence incriminating to the defendant. The prosecution established that they were interrogating defendant on the basis of information already in their possession from lawful sources. Even if the search had not occurred, they would have interrogated the defendant concerning the identical incriminating evidence which the illegal search produced, as the police officers also secured this information from lawful sources. Such a showing by the prosecution eliminates illegal search as the sole producing agent of the interrogation itself and the confession was properly held not to be tainted.

In *Harlow v. United States*, 301 F.2d 36 (5th Cir.), *cert. denied*, 371 U.S. 814, 83 S.Ct. 25, 9 L.Ed.2d 56 (1962), the defendant was interrogated after federal agents illegally intercepted certain letters. The court said that any taint upon the defendant's confession resulting from this illegal interception was removed by prosecution evidence that prior to the interception, the agents had information which in and of itself warranted the interrogation. The court said: "The investigating agents were not forever precluded from interrogating McLane and pressing him to confess merely because they thereafter illegally seized other evidence tending to implicate McLane in the bribe scheme." 301 F.2d at 373.

Defendant has established that the interrogators made use of illegally obtained information during the interrogation. This is not a situation where the officers displayed to the defendant highly incriminating items with a demand that he explain his possession of them, nor was it a situation where the officers used information gained during the search as the sole basis for questioning. The presence or absence of this factor is highly significant in determining whether the confession is tainted.

[21] Admittedly, some improperly obtained information was used. In such a situation the confession bears the ap-

taint as the illegal information and is inadmissible unless the prosecution can establish that such use was not the sole effective cause of the confession being made. It can discharge this burden by showing that the confession had another, and lawful, cause.

For example, in *United States v. Rutheiser*, 208 F.Supp. 891 (S.D.N.Y.1962), a defendant claimed that his confession to the possession of stolen goods was tainted because his interrogators made use of their knowledge that the goods had been found in his home during an illegal search. The court was able to find that the confession was the product not of this circumstance but, rather, of the confrontation of the defendant by the one who sold the goods to him. "This statement has no apparent connection with the illegally seized evidence and stems from Rutheiser's alleged purchase of stolen goods from Jones. This statement was based upon facts developed independently of the illegal search...." 208 F.Supp. at 893–4.

[22, 23] It is necessary for the defendant to establish only a probable causal connection between the illegal act and the proffered statement or confession. The prosecution must then assume the burden of proving that the illegal act was not the sole effective cause of the acquisition of the evidence or statement. The crucial factor in resolving the issue of what in fact caused the defendant to make his statement is his own motive. The issue is what motivated the accused to confess. The prosecution need establish only that the tainted information or evidence probably was not the sole effective cause of the accused's confession, and the defendant then has the burden of proving otherwise. The confession is never admissible unless the prosecution establishes it was made voluntarily by the accused. Such a showing is a factor in and of itself to show that the confession was not the product of the tainted evidence. The accused is the best witness as to his own motives, and there is no injustice in a rule which requires him, in this limited area, to prove what his motive was in confessing if he wishes to invoke the strong medicine of the exclusionary rule. *See* Maguire, *How to Unpoison the Fruit*, 55 J.Crim.L., Criminology, and Police Sci. 307, 321 (1964). Defendant certainly has not sustained this burden.

[24] Defendant contends that the trial court committed reversible error when it overruled his objection to Dr. Schofield's opinion concerning the cause of death of the victim, arguing that the expert can only present an opinion when it is expressed in terms of "reasonable medical certainty". He relies on *Fisher v. State*, 361 So.2d 203 (Fla. 1st DCA 1978), and *Wright v. State*, 348 So.2d 26 (Fla. 1st DCA), *cert. denied*, 353 So.2d 679 (1977). In *Fisher* and *Wright*, convictions were reversed because the evidence adduced in each one of these cases was beyond the expertise of the expert witness. In a criminal case expert medical opinion as to cause of death does not need to be stated with reasonable medical certainty. Such testimony is competent if the expert can show that, in his opinion, the occurrence could cause death or that the occurrence might have or probably did cause death. *See Copeland v. State*, 58 Fla. 26, 50 So. 621 (1909); *Hampton v. State*, 50 Fla. 55, 39 So. 421 (1905); 24 Fla.Jur.2d *Evidence and Witnesses* § 683 (1981); Smith and Tipton, *Reasonable Medical Certainty in Florida*, 30 Fla.B.J. 327 (May 1956).

[25] In *Clemons v. State*, 48 Fla. 9, 37 So. 647 (1904), a homicide case, it was held that the trial court did not commit error in overruling an objection to a question asked by the state attorney: "Doctor, in your opinion, as a physician, could the wound have been produced by a naked fist?". Even though the state may be required to prove the cause of death beyond a reasonable doubt, this does not mean that every link in the chain of evidence must be so proved. To be admissible, a medical expert's opinion as to the cause of an injury or death does not have to be expressed in terms of a reasonable medical certainty. Such evidence is admissible, but the weight to be given it is a matter to be determined by the jury. *See Holland v. State*, 359

So.2d 28 (Fla. 3d DCA 1978), cert. denied, 367 So.2d 1124 (Fla.1979). This contention of the defendant is without merit.

[26, 27] The trial court properly denied defendant's request to instruct the jury on the maximum and minimum sentences for lesser included offenses of first-degree murder. Tascano v. State, 393 So.2d 540 (Fla. 1980), does not require that a jury be instructed on the penalty for lesser included offenses. James v. State, 393 So.2d 1138 (Fla. 3d DCA), review denied, 402 So.2d 610 (Fla.1981). The instructions to the jury were in writing as required by Florida Rule of Criminal Procedure 3.390(b). Defendant requested that they be sent with the jury when the jury retired to deliberate. The trial judge denied the request but stated that if the jury came back with a question all of the instructions would be furnished to the jury. Florida Rule of Criminal Procedure 3.400 gives the trial court discretion in determining whether the instructions should be sent to the jury room when the jury retires for deliberation. Defendant argues that the requirement of delivery to the jury so that they could have the written instructions during deliberations was a mandatory duty. The rule makes it clear that it is in the sound discretion of the trial court to determine whether written instructions should be carried in their written form by the jury to the jury room for use during its deliberations. Matire v. State, 232 So.2d 209 (Fla. 4th DCA 1970). Defendant has failed to show an abuse of discretion.

[28] The standard jury instructions were given to the jury. Defendant contends that the trial court committed error when it denied a requested instruction that mitigating circumstances other than the statutory ones could be considered. Defendant relies upon Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). It does not appear that the trial judge precluded defendant from offering any evidence of non-statutory mitigation. The trial judge correctly ruled that the standard jury instruction adequately covered the instructions on mitigating circumstances. Buford v. State, 403 So.2d 943 (Fla.1981), cert. denied, 454 U.S. 1164, 102 S.Ct. 1039, 71 L.Ed.2d 320 (1982).

We now consider the propriety of the imposition of the death sentence. This sentence concurred with the recommendation of a majority of the trial jurors. The trial judge made the following findings:

AGGRAVATING CIRCUMSTANCES

(a) The capital felony was committed by a person under sentence of imprisonment in that the Defendant was convicted of the felony of "unarmed robbery and an assault with intent to commit rape", and under sentence and parole therein. For details see State's exhibits in evidence # 25 and # 26.

(b) The Defendant was previously convicted of another felony involving the use or threat of violence to the person, said felony being the same felony referred to in paragraph (a) above.

(c) The Defendant knowingly created a great risk to many persons when he drove down Highway # 70 with one arm on the wheel of the automobile in question and the other arm holding the victim in such a manner as to allow her to hang out the banging open door of the vehicle. This reckless driving could easily have resulted in a collision with either another vehicle or a school bus resulting in death to many persons.

(d) The capital felony was committed while the Defendant was engaged in the commission of a kidnapping, robbery, and rape.

(e) The capital felony was committed for pecuniary gain.

(f) The capital felony was especially cruel.

MITIGATING CIRCUMSTANCES

(a)—(g) none

(h) The Defendant's behavior at his second trial and during his stay on death row (as determined by the court's own personal investigation) was acceptable. Perhaps there was some remorse. It is unfortunate that the law upon the convic-

tion of the first offense does not allow for castration in cases of this nature for then neither the school teacher nor the defendant would be in their current predicament.

This Court finds from the evidence the aggravating circumstances exceed the mitigating circumstances in this case, thus warranting both the jury and the Court's death sentence.

[29] The state adduced evidence that defendant had been charged in Michigan with rape and armed robbery and that he had pled guilty to the reduced charges of unarmed robbery and assault with intent to commit rape. The defendant argues that the court committed error in allowing evidence to be admitted which showed the use or threat of violence to the person during commission of the unarmed robbery and assault with intent to commit rape. The state contends that this evidence was relevant to prove an aggravating circumstance. This procedure was approved in *Elledge v. State*, 346 So.2d 998 (Fla.1977). We held it proper to permit the state to adduce the testimony of the widow (Mrs. Nelson) of a murder victim whose murder had been used to support a finding that the defendant had been previously convicted of a violent felony. We said:

> The question then arises whether it was proper to permit Mrs. Nelson to testify concerning the events which resulted in the conviction as opposed to restricting the evidence to the bare admission of the conviction. We conclude it was appropriate to admit Mrs. Nelson's testimony. This is so because we believe the purpose for considering aggravating and mitigating circumstances is to engage in a character analysis of the defendant to ascertain whether the ultimate penalty is called for in his or her particular case. Propensity to commit violent crimes surely must be a valid consideration for the jury and the judge. It is matter than can contribute to decisions as to sentence which will lead to uniform treatment and help eliminate "total arbitrariness and capriciousness in [the] imposition" of the death penalty. *Proffitt v. Florida*, *supra*, 96 S.Ct. at 2969.
>
> Our conclusion in this regard is buttressed by the language of the statute: "... In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include *matters relating to any of the aggravating or mitigating circumstances* enumerated in subsections (6) and (7). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the constitutions of the United States or of the State of Florida...." (Emphasis supplied) § 921.141(1), Fla.Stat.

346 So.2d at 1001–02. If a defendant was previously convicted of any violent felony, any evidence showing the use or threat of violence to a person during the commission of such felony would be relevant in a sentence proceeding.

[30] At defendant's first trial, the trial judge "found the evidence at trial insufficient to support a felony murder basis for conviction." The present trial was not submitted to the jury on the phase of felony murder, but at the penalty phase the state argued that the offense was committed during a rape, robbery or kidnapping. Defendant argues that the resubmission of this issue constituted double jeopardy and relies upon *Bullington v. Missouri*, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981). In *Bullington*, the defendant was originally tried for murder and convicted. In a separate sentencing phase the jury fixed his punishment at life imprisonment. Subsequently, defendant sought a new trial and his motion was granted. The Missouri authorities notified him that the state would seek the death penalty at the new trial. On these facts the Supreme Court held that it was a violation of the double jeopardy clause of the constitution to seek to impose

the death penalty since a jury had already acquitted the defendant of whatever was necessary to impose a death sentence.

In contrast to *Bullington*, the defendant here was not acquitted of whatever was necessary to impose the death sentence at his first trial and sentencing hearing. There the trial court, accepting the jury's recommendation, sentenced defendant to death in the first proceeding. The double jeopardy clause does not bar the state from adducing evidence necessary to demonstrate that the death penalty is appropriate in this trial just as it does not preclude the state from re-trying a defendant who has succeeded in overturning his conviction for trial error. *See United States v. Tateo*, 377 U.S. 463, 84 S.Ct. 1587, 12 L.Ed.2d 448 (1964).

[31] The defendant argues that there was a doubling-up of the same aggravating circumstance, as the trial judge found that the capital felony was committed by a person under sentence of imprisonment and that the defendant was previously convicted of another felony involving the use of violence. He relies upon the principles set forth in *Provence v. State*, 337 So.2d 783 (Fla.1976), *cert. denied*, 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed.2d 1065 (1977). In *Provence*, we held that the commission of a capital felony in the course of a robbery and the commission of a capital felony for pecuniary gain would constitute only one aggravating factor, since both aggravating factors referred to the same aspect of the defendant's crime. However, the aggravating factors of being under sentence of imprisonment and being previously convicted of another felony involving violence do not cover the same aspect of the defendant's criminal history. The defendant could be under a sentence of imprisonment without having been convicted of a felony involving violence. Also, a defendant could be convicted of a felony involving violence without being under a sentence of imprisonment. These aggravating circumstances are separate, and including the two factors in the weighing process does not constitute a doubling of aggravating circumstances.

[32] The court's finding that the murde was committed while defendant was unde sentence of imprisonment is fully supporte by evidence that he was on parole fro prison for offenses committed in Michiga *See Straight v. State*, 397 So.2d 903 (Fla.), *cert. denied*, 454 U.S. 1022, 102 S.Ct. 556, 7(L.Ed.2d 418 (1981). The court's finding that defendant had been previously convicted of a felony involving the use of force is supported by the same evidence.

[33] The court's finding that defendant created a great risk of death to many persons is supported by evidence that defendant drove erratically presenting a danger to lives of motorists on a highway while he was struggling with the victim. It is only conduct surrounding the capital felony for which defendant is being sentenced which properly may be considered in determining whether defendant "knowingly created a great risk of death to many persons." *Mines v. State*, 390 So.2d 332 (Fla.1980), *cert. denied*, 451 U.S. 916, 101 S.Ct. 1994, 68 L.Ed.2d 308 (1981), *Elledge v. State*, 346 So.2d 998, 1004 (Fla.1977).

In *Kampff v. State*, 371 So.2d 1007 (Fla. 1979) and *Lewis v. State*, 377 So.2d 640 (Fla.1979), only two persons other than the deceased were present during the commission of the homicide. The court pointed out that the risk of death created by the capital felon's actions must be "many" persons, and a great risk of death to a small number of people would not establish this aggravating circumstance.

In *King v. State*, 390 So.2d 315 (Fla.1980), *cert. denied*, 450 U.S. 989, 101 S.Ct. 1529, 67 L.Ed.2d 825 (1981), we held that by setting fire to the house in which the victim resided and in which no other person was present, the defendant knowingly created great risk to many persons because he should have reasonably foreseen that the blaze would pose a great risk to the neighbors as well as the firefighters and the police who responded to the call. In *Welty v. State*, 402 So.2d 1159 (Fla.1981), we held that by setting fire to a building the defendant posed a direct threat of death to six elderly persons resid-

ing in the building as well as the neighbors, firefighters, and police responding to the call. In each instance, we sustained the trial court's finding that defendant created a great risk of death to many persons.

In the case *sub judice* the struggle with the victim was clearly conduct surrounding the capital felony. There were numerous vehicles on the highway and defendant should have reasonably foreseen that his erratic driving and possible loss of control of the car would have created a "great risk" of danger to many persons, including the risk of crashes, possible harm to neighbors, and to police responding to the scene.

The evidence fully supports the finding that the murder occurred while defendant was engaged in commission of a kidnapping, robbery, and rape. The victim was abducted at knife-point from the laundromat and taken by defendant in his car. Although she was wearing a red top when she left for the laundry, she only had shorts on when her body was recovered. Defendant also took the victim's pocketbook and buried it. This evidence is insufficient to support the finding that the felony was committed for pecuniary gain.

[34] Evidence of the victim's kidnapping, her struggle, her pleas for help, and the extremely cruel beating and strangulation death supports the finding that the murder was extremely cruel, heinous, and atrocious.

The court considered defendant's contention that he was acting under extreme emotional duress and properly rejected it, as did all three psychiatrists who examined defendant.

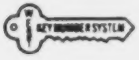
[35] Before imposing sentence, the trial judge visited Florida State Prison to determine if defendant's conduct on death row constituted a mitigating circumstance. Defendant says this violates the principles of *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). It does. However, as the result of this investigation the trial judge found a non-statutory mitigating factor which he considered in imposing sentence. This error did not injuriously affect the substantial rights of the defendant.

The facts supporting the sentence of death are clear and convincing and are established beyond a reasonable doubt. We have carefully examined the record in this case and considered the brief of the defendant. Defendant has had a fair trial and other questions presented by him in the brief are without merit.

It is therefore our opinion the judgment and sentence should be affirmed.

It is so ordered.

ALDERMAN, C.J., and BOYD, OVERTON, McDONALD and EHRLICH, JJ., concur.



Dan Edward ROUTLY, Appellant,

v.

STATE of Florida, Appellee.

No. 60066.

Supreme Court of Florida.

Sept. 22, 1983.

Rehearing Denied Dec. 12, 1983.

Defendant was convicted in the Circuit Court, Marion County, Carven D. Angel, J., of first-degree murder, and he appealed. The Supreme Court, Adkins, J., held that: (1) defendant's tape-recorded confession which he gave to Florida officers shortly after his arrest in Michigan was not subject to being suppressed on ground that defendant was arrested on information that fell below standard of probable cause; (2) unavailability of an eyewitness was unforeseeable and, hence, was a basis for a justifiable extension of speedy trial rule; and (3) aggravating factors that homicide was committed while defendant was engaged in a

IN THE SUPREME COURT OF FLORIDA

DAVID ROSS DELAP,	)	
Appellant,	)	
vs.	)	CASE NO: 56,235
STATE OF FLORIDA,	)	
Appellee.	)	

MOTION FOR REHEARING

Appellant, DAVID ROSS DELAP, through undersigned counsel, hereby requests this Court pursuant to Fla. R. App. P. 9.330(a), to grant rehearing to its opinion of September 15, 1983, and as grounds therefore would show to the court as follows:

1) This Court's opinion on the confession issue, which establishes novel procedural requirements that were not raised by either party, is premised on faulty research. The opinion relies too heavily on the article by Maguire, How to Unpoison the Fruit, 55 J. Crim. L., Criminology, and Police Sci. 307 (1964), because the article does not accurately recount the facts and holdings of some cases it cites in support of Maguire's novel theories. For example, this Court's requirement that defendant prove his motive in confessing and its discussion of Harlow v. United States, 301 F.2d 361 (5th Cir. 1962) comes directly from Maguire's article at pages 320 and 318. However, Maguire is in error in recounting that McLane was a defendant; since, in fact, McLane was a state's witness, his failure to testify to what motivated his cooperation is not grounds for holding that a defendant has the burden to prove what was his motive in confessing. This Court's allocating such a burden to a defendant attempting to assert his Fourth Amendment rights is completely unprecedented and most unfair, in violation of appellant's rights under the Fourth and Fourteenth Amendments.

Also, Maguire overstates the facts of United States v. Rutheiser, 203 F.Supp. 891 (S.D.N.Y. 1962), in order to make it appear that his problematic premise was resolved favorably to the government. Maguire recounts that the government there proved

that an illegal search was not the" sole effective cause"of a confession being made. Such premise of Maguire is not the appropriate legal standard to be applied in the first place, but rather the United States Supreme Court's standards as to whether an intervening event has broken the causal connection between an illegal search and the defendant's confession.

The facts of United States v. Rutheiser do not establish that Rutheiser's "interrogators made use of their knowledge that the goods had been found in his home during an illegal search", as this Court states at page 15 of its opinion in identical language to Maguire at 319. Rather, the district court's order in United States v. Rutheiser, stated that upon examining the defendant's signed statement, the judge found that the statement had no apparent connection with the illegally seized evidence. Thus, the Rutheiser opinion does not establish that the interrogators confronted Rutheiser with evidence from the illegal search and seizure from his home. The facts in United States v. Rutheiser, supra, also do not confirm that such court made a finding that Rutheiser's confession "was the product not of this circumstance but, rather, of the confrontation of the defendant by the one who sold the goods to him." Court opinion at 15; Maguire at 319. Further, the year was 1961 when Rutheiser was arrested in his home without a warrant following the illegal search; thus, the 1962 district court decision in his case, which predates Wong Sun v. United States, 371 U.S. 471 (1963), Payton v. New York, 445 U.S. 573 (1980), Brown v. Illinois, 422 U.S. 590 (1975), and Taylor v. Alabama, ___U.S.___, 73 L.Ed.2d 314 (1982), has no continuing validity in light of the later rulings.

2) Although this Court quotes that portion of Brown v. Illinois, supra, that sets forth the factors to be considered in determining whether the defendant's confession is the product of free will under Wong Sun (Opinion at 11), the Court gives no consideration whatsoever to the nature, purpose and flagrancy of the official's misconduct nor to the temporal proximity between the execution of the lawless exploratory search and appellant's confession. The very purpose of this illegal search pursuant to a general warrant, a flagrant violation of the Fourth Amendment,

was to secure evidence with which to confront appellant's explanations, show appellant that Brumley knew he was lying and thereby induce him to confess (R-711,2742). This Court has not fully and fairly considered this issue on appeal while failing to examine the relevant facts.

3) This Court's opinion does not identify what facts of record supports its conclusion that "the police officers also secured this information from other lawful sources" (Opinion at 14). The state's suggestion that Mrs. Delap's statements to the officers during the exploratory search of the marital home could be the "independent source" obviously cannot be the basis for the above-quoted because Mrs. Delap was present at her home and made the remarks during the illegal search. Concerning exactly this scenario, this Court said at page 13 of the opinion:

> For example, an individual who was present while his home is being searched makes remarks to the searchers during course of the search. Clearly, any such remarks are the result of the search and, if the search is declared illegal, are tainted by it.

Information secured from statements of a wife during an illegal search of a marital dwelling are, without question, derived from the illegal conduct and not independent of it. See Somer v. United States, 138 F.2d 790 (2d Circuit 1943), discussed in Maguire at page 315. No facts of record support a conclusion that the state has made a showing of an independent lawful source.

4) In the second paragraph of page 14, this Court so badly paraphrases Maguire's article at page 318, second column first paragraph as to mix up the concepts Maguire sets forth. Where the opinion reads:

> In the case sub judice the search did result in the discovery of evidence incriminating to the defendant. The prosecution established that they were interrogating defendant on the basis of an information already in their possession from lawful sources. Even if the search had not occurred, they would have interrogated the defendant concerning the identical incriminating evidence which the illegal search produced, as the police officers also secured this information from lawful sources. Such a showing by the prosecution eliminates illegal search as the sole producing agent of the interrogation itelf and the confession was properly held not to be tainted.

Maguire's article in nearly identical form states:

> Let us suppose, however, that although the search did result in the discoveryof evidence highly incriminating to the defendant, the prosecution is able to establish that even if the search had not occurred they would have interrogated the defendant on the basis of information already in their possession from lawful sources. Such a showing would eliminate the illegal search as the sole producing agent of the interrogation itself, and on this state of the record, the confession should be held not to be tainted.

In this second paragraph of page 14 of the opinion, Maguire's theory of independent sources as the cause of the interrogation is treated by the Court as a mixture of the concepts of independent source and inevitable discovery. The Court cites no case where United States Supreme Court has applied the inevitable interrogation rule to a confession. Theories of Maguire from a 1959 article may have been accepted by United States Supreme Court and adopted as law in Wong Sun, 371 U.S. at 488, but Maguire's theories from this 1964 article have never been adopted by the Court as the appropriate standards under the Fourth Amendment. Therefore, Maguire's theories are merely theories, not law.

The Court does not say that the officers had secured the "identical incriminating evidence which the illegal search produced" at the time of the interrogation. The United States Supreme Court has established that timing or temporal proximity is critical to a determination of whether the confession was the product of a free will. Brown v. Illinois, supra, Taylor v. Alabama, supra. It makes no difference that the officers might have, or would have secured the same information that the illegal search produced unless they actually had it in time to confront the defendant with that information and induce him to confess before the defendant invoked his right to counsel, which appellant did later that night (R-2758).

That a defendant would have been subjected to interrogation even though an illegal search did not occur does not assure that the defendant would have inevitably confessed merely because he was going to be questioned. In paraphrasing this second paragraph on page 14 from Maguire's article at page 318, second

column, first paragraph, this Court has established an unfair legal fiction, which renders irrelevant to a review of appellant's Fourth Amendment claim what the officers actually did and how the interrogation actually proceeded. Thus, this Court fails to observe the standards set out by the United States Supreme Court regarding breaking of a causal connection and establishes its own standards in their stead.

Whether a defendant would have confessed anyway without having been confronted with the fruits of an illegal search is an impossibly unobjective standard for the courts to attempt to apply. This Court must look at all the relevant facts of the interrogation, the appellant's statement that he wanted to go, his refusal to confess during the first two hours of interrogation, his then being confronted with the facts and findings of the illegal exploratory search and his confession which resulted after only twenty minutes of the officer's pointing out that they had the evidence to show that the defendant's denials were a lie. What could have, might have, or would have happened if the facts had been slightly different and more favorable to the state cannot excuse the illegality or cure the taint to the confession which was prompted by the illegal search and leads uncovered by it.

Appellant requests this Court to grant rehearing, to delete all references, paraphrasing and quotations from the outdated article written by Maguire and to substitute the appropriate standards and criteria established by the United States Supreme Court in reviewing appellant's claim that his confession was illegally secured in violation of his rights under the Fourth, Fifth and Fourteenth Amendments to the United States Constitution.

5) This Court's opinion overlooks applicable double jeopardy principles in affirming the trial court's finding that the aggravating circumstances (d) and (e) are not constitutionally infirm (Opinion at page 20). Although the double jeopardy clause does not preclude the state from retrying a defendant who has succeeded in overturning his conviction for trial error, a defendant's successful appeal of trial error does

not vitiate his double jeopardy rights to permit him to be retried for the original, higher charge where he was acquitted of that charge by a lesser verdict. Green v. United States, 355 U.S. 184 (1957), Price v. Georgia, 398 U.S. 323 (1970). See also: Johnson v. State, 27 Fla. 245, 9 So. 208 (1891), Sanford v. State, 75 Fla. 393, 78 So. 340 (1918). Thus, even on a retrial, the double jeopardy clause still prohibits the state from trying a defendant on any portion of the charge of which he was previously convicted.

Appellant contends here only that he has been acquitted by a finding of insufficiency of the evidence at the close of the guilt phase of the first trial of any evidentiary basis for an underlying felony. After a finding of insufficiency of the evidence, the double jeopardy clause bars relitigation of the issue even though the defendant has sought a new trial as one of his remedies. Burks v. United States, 437 U.S. 1 (1978). Double jeopardy principles apply to the sentencing phase of a capital trial. Bullington v. Missouri, 451 U.S. 430 (1981). Thus, the state was precluded from relitigating the applicability of this aggravating circumstance as grounds to sustain a new death sentence under the constitutional requirement of collateral estoppel, which is incorporated in a double jeopardy clause. Ashe v. Swenson, 397 U.S. 436 (1970).

6) This Court's approval of an aggravating circumstance on the ground that "the defendant should have reasonably forseen that his erratic driving and possible loss of control of the car would have created a 'great risk' of danger to many persons" (Opinion at 22) directly contravenes the standards this Court established in Kampff v. State, 371 So.2d 1007 (Fla. 1979). Kampff clearly disallows the finding of this aggravating circumstance on a "mere possibility." Id. at 1009. Appellant did not kill Etheridge by his careless driving; according to Brumley, the killing took place on Raulerson Road when no one else was around. The Eighth Amendment's requirements of consistency and non-arbitrariness are violated by the application of this aggravating circumstance in appellant's case. The interpretation here placed upon this aggravating circumstance is

so overbroad as to be incapable of narrowing the class of capital murders to which this circumstance applies in violation of the Eighth and Fourteenth Amendments.

7) This Court did not even consider the mitigating circumstances and whether the aggravating circumstances outweigh, rather than exceed the mitigating circumstances, in reviewing the sentence of death. Three mitigating circumstances were found by the trial judge but only two were made in writing. At the sentencing hearing, the court articulated a third mitigating circumstance, that the appellant indicated his responsibility and told where the body was (R-1338). The trial court's failure to set forth in writing its findings upon which the sentence of death is based is a deficiency which rises to the level of an error of constitutional dimension. Foster v. Strickland, 707 F.2d 1339, 1348 (11th Circuit 1983). This is a violation of the due process clause of the Fourteenth Amendment which requires this Court to vacate the sentence of death. Foster v. Strickland, supra.

8) This Court's opinion has overlooked that improper, unconstitutional factors were considered by the trial judge in imposing the death sentence. At the time of the sentencing hearing, the court commented that appellant had a problem of taking his frustrations out on innocent people, that he had that problem in Michigan and when the school teacher was sticking out the car door (R-1337) and that executing appellant would not deter all murders but it would save the life of one or two girls or innocent people (R-1339). In his sentencing order the court said that it was unfortunate that the law did not allow for appellant to have been castrated after his first offense in Michigan for then appellant and the school teacher (Etheridge) would not be in their current predicament. Taken together, these remarks of the court at the sentencing hearing and this statement in his sentencing order show that the trial judge considered the improper factors of lack or rehabilitation unless the defendant could be castrated and the possibility of killing another girl or school teacher in the future if he weren't executed. The trial court's sentence of death and reliance on these improper factors

where mitigating circumstances are present contravenes the Eighth and Fourteenth Amendment and requires that appellant's death sentence be vacated. Goode v. Wainwright, 704 F.2d 593 (11th Circuit 1983).

WHEREFORE, in light of the foregoing considerations, appellant requests this Court to grant rehearing, to correct its opinion, and to grant appellant the relief to which he is entitled under the law and the constitution.

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender

Margaret Good

MARGARET GOOD
Assistant Public Defender
15th Judicial Circuit
224 Datura Street/13th Floor
West Palm Beach, Florida 33401
(305) 837-2150

Counsel for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by courier to HONORABLE MAX RUDMANN, Assistant Attorney General, Room 204, 111 Georgia Avenue, Elisha Newton Dimick Building, West Palm Beach, Florida 33401, this 29th day of September, 1983.

Margaret Good

IN THE SUPREME COURT OF FLORIDA

WEDNESDAY, DECEMBER 14, 1983

DAVID ROSS DELAP,	**	
Appellant,	**	CASE NO. 56,235
vs.	**	Circuit Court Case Nos.
STATE OF FLORIDA,	**	CR-78-2757 (Orange) 75-47-CF (Okeechobee)
Appellee.	**	

On consideration of the motion for rehearing filed by attorney for appellant, and response thereto,

IT IS ORDERED by the Court that said motion be and the same is hereby denied.

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

By: Debbie Causseaux
Deputy Clerk

cc: Hon. William D. Gorman, Clerk
Hon. Philip G. Nourse, Judge

Margaret Good, Esquire
Max Rudmann, Esquire

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APPELLATE DIVISION

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No. 83-6419

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

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DAVID ROSS DELAP
Petitioner,
vs.

STATE OF FLORIDA,
Respondent.

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MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Petitioner, DAVID ROSS DELAP, who is now imprisoned in the custody of the Florida Department of Corrections, asks leave to file the accompanying Petition for Writ of Certiorari without pre-payment of costs and to proceed in forma pauperis pursuant to Rule 46 of the Rules of this Court. Petitioner has proceeded in forma pauperis at all times in the state courts below. Petitioner has attached hereto his affidavit in substantially the form prescribed by Fed. Rules App. Proc., Form 4, and the Rules of this Court.

Respectfully Submitted,

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
224 Datura Street/13th Floor
West Palm Beach, Florida 33401
(305) 837-2150

BY Louis G. Carres
LOUIS G. CARRES
Assistant Public Defender

No. 83-6419

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

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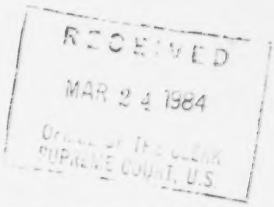
DAVID ROSS DELAP,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.



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AFFIDAVIT IN SUPPORT OF REQUEST TO PROCEED IN FORMA PAUPERIS

I, DAVID ROSS DELAP, being first duly sworn, depose and say that I am the petitioner in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to relief.

I further swear that the responses which I have made to questions and instructions below are true.

1. Are you presently employed? Yes [ ] No [X]

a. If the answer is "Yes", state the amount of your salary or wages per month, and give name and address of your employer.

---

b. If the answer is "No", state the date of last employment and the amount of the salary and wages per month which you received. July 7th 1972 - $620.00 + Commissions

---

2. Have you received within the past twelve months any money from any of the following sources?

a. Business, profession or from self employment? Yes [ ] No [X]

b. Rent payments, interest or dividends? Yes [ ] No [X]

c. Pensions, annuities or life insurance payments? Yes [ ] No [X]

d. Gifts or inheritance? Yes [X] No [ ]

e. Any other sources? Yes [ ] No [ ]

If the answer to any of the above is "yes", describe each source of money and state the amount received from each during the past twelve months. $10.00 TO $20.00 EACH [illegible] OF MONTHS FROM CHRISTIAN ORGANIZATIONS [illegible]

3. Do you own cash, or do you have money in a checking or saving account? Yes [X] No [ ] (Include any funds in prison accounts)

If answer is "yes", state the total value of the items owned. $5.00 IN INMATE ACCOUNT.

4. Do you own any real estate, stocks, bonds, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes [ ] No [X]

If the answer is "yes" describe the property and state its approximate value. _____

5. List the persons who are dependent upon your support, state your relationship to those persons and indicate how much you contribute toward their support. _____

I understand that a false statement to any questions in this affidavit will subject me to penalties for perjury.

"I declare under penalty of perjury that the foregoing is true and correct."

STATE OF FLORIDA)

COUNTY OF BRADFORD)

DAVID ROSS DELAP being first duly sworn under oath, presents that he has read and subscribed to the above and states that the information therein is true and correct.

_____
Signature of Petitioner

SUBSCRIBED and SWORN to before me this ___ day of _____, 1984.

_____
NOTARY PUBLIC

NOTARY PUBLIC, STATE OF FLORIDA
My Commission Expires Oct. 4, 1988

My Commission Expires: